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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of the Commission's )  
Policies on Preferences in )  
Comparative Broadcast Hearings )

RM-7741

#### REPLY COMMENTS

Larry G. Fuss d/b/a Contemporary Communications, joined by Radix Broadcasting, Inc., Howard N. Binkow, and Dale A. Ganske ("Petitioners"), by counsel, submit these Comments in Reply to those of the National Association of Broadcasters ("NAB"), Sacred Heart University ("SHU"), and those of the National Association for the Advancement of Colored People, the League of Latin American Citizens, and the National Black Media Coalition (collectively, "the Civil Rights Organizations").

Petitioners agree with the Comments of the NAB in full and have no objection to NAB's proposal that a similar preference apply in comparative hearings for new television stations as the result of a new allotment. Furthermore, Petitioners believe NAB's suggestions on the reimbursement of expenses to be well-taken.

Similarly, Petitioners have no objection to application of such a preference in the context of new noncommercial educational stations, whether FM or television. The same justification for the preference would exist in this context as well as in the context identified by NAB.

Petitioners must take issue, however, with the Civil Rights Organizations assertions that grant of such a preference would serve no valid public interest. As noted in the Petition for Rulemaking, the Commission has already found increasing the number of broadcast facilities and the number of communities served to be in the public interest. Giving parties an incentive to bear the costs and risks of implementing that process is, therefore, in the public interest.

Furthermore, the fact of establishing a new allotment demonstrates the petitioner's commitment to establishing the new facility and serving the community because the petitioner is required to assert that it will apply for the channel, if allotted, in addition to the time and expense undertaken to accomplish the allotment. The Commission's additions over the years to the considerations employed in determining what is likely to constitute "best practicable service" demonstrates that this term must be interpreted broadly, and such a commitment should be relevant.

The Civil Rights Organizations further assert that there is no need to provide additional incentive for parties to locate new broadcast channels and that such an incentive, if adopted, will merely encourage service only to already served communities. Petitioners, one of whom is a consulting engineer, can state with some authority that there are very few, if any, openings left to drop in facilities in or near

large markets. Openings are increasingly limited to very small markets for which it is difficult to regain the large capital expenses involved in locating the opening, seeking the allotment, facing competing applicants, and, ultimately, constructing the facilities. Unless an entrepreneur is given an incentive and some indication that its efforts will be rewarded, these markets will languish unserved.

The Civil Rights Organizations' argument that licensees of stand-alone AM stations will be encouraged to "dump" the AM station upon obtaining a large-market FM station similarly ignores business realities. First, as noted, large-market drop in opportunities are now minimal. If, however, the goal is to "dump" the AM, there is no reason to pursue an allotment; there are plenty of facilities for sale. Second, the costs of construction and operation of a new FM in the same market as an existing AM are less due to economies of scale, i.e., the opportunities to co-locate on an existing tower, at existing studios, and, consequently, to use an existing administrative and management staff.

In fact, any licensee operating an AM stand-alone in a market, particularly if that stand-alone is a day-timer, has proved an existing commitment to the community it serves; it has not demonstrated a propensity to "dump" the AM facility for a major-market FM. Yet, current Commission policy requires them to divest the AM (if they do not qualify for the

day-timers' preference<sup>1</sup>) in order to have any opportunity to prevail in a comparative hearing, as recognized by the Civil Rights Organizations, -- the very "dumping" that the Civil Rights Organizations foresee if the proposed preference is adopted. Petitioners do agree with the Civil Rights Organizations, however, that for the preference to be effective in such circumstances, it must have at least the same weight as a day-timers preference.

With respect to the second major objection of the Civil Rights Organizations, that such a preference would deprive the public of service by minorities, Petitioners have difficulty understanding the basis for this conclusion. The Commission's allotment procedures themselves do not discriminate against minorities. Furthermore, as they note, the Commission's comparative hearing policies already give a preference to minorities. Such an incentive as that proposed would also be an incentive for minorities to seek new allotments, not only as a means of identifying new possible facilities for which they could apply, but also for augmenting their comparative position in applying for the new facility.

The sole basis for this argument seems to be that minorities, as a whole, lack funds to seek a new allotment.

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<sup>1</sup> In order to qualify for the day-timers' preference, the applicant must have been the licensee for the facility for three years prior to applying for the new FM. A licensee in this situation would have every incentive not to seek an allotment, as it cannot win in a comparative hearing and only invites competition which would likely destroy the economic condition of the existing facility.

Unfortunately, particularly in the current economic climate, minorities are not alone with this problem; it is one which has affected the entire broadcast industry and further discourages seeking out opportunities for new facilities.<sup>2</sup> If no one has sufficient funds or incentive to seek new allotments, minorities will have even fewer opportunities to apply for a construction permit, which the Civil Rights Organizations assert is virtually their only access to broadcast facilities. Thus, contrary to their argument, failure to establish such an incentive will itself have a detrimental effect on minority broadcast ownership.<sup>3</sup>

It is the firm belief of Petitioners, and all the other Commenters in this proceeding except for the Civil Rights Organizations, that the requested preference would be in the public interest and consistent with existing Commission policies, including the minority preference. That a difference of opinion exists on the likely result of establishing such a preference supports the opening of a

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<sup>2</sup> It has been well-documented that the current credit-crunch and general economic decline hits broadcasting particularly hard. See "First-Quarter Numbers: As Bad as Expected", *Broadcasting* at 43 (Apr. 29, 1991); "Economics are Factor in 'Stick Shock'", *Broadcasting* at 50 (Nov. 26, 1990). Broadcasters have no revenue except for advertising, usually the first expense cut when there is an overall decline in business activity. See, e.g., "Advertising Revenue's Great Expectations", *Broadcasting* at 82 (Apr. 15, 1991).

<sup>3</sup> For purposes of this Reply, Petitioners take at face value the Civil Rights Organizations' assertion that minorities as a whole do not have the funds to seek new allotments.

rulemaking proceeding, whereby additional views can be obtained and a fuller record developed.

Consequently, Petitioners continue to respectfully request that a rulemaking be opened for the purpose of establishing a comparative preference benefitting petitioners who assume the risk and expense of locating an available channel for a new FM allotment and successfully pursuing that allotment through the Commission's rulemaking process and who become applicants for the new channel allotted.

Respectfully submitted,

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August 8, 1991

## CERTIFICATE OF SERVICE

I, Angela R. Pomeroy, a secretary for the law firm Venable, Baetjer, Howard & Civiletti, do hereby certify that a true and correct copy of the foregoing "Reply Comments" was sent via U.S. First Class Mail, postage prepaid, on this the 8th day of August, 1991 to each of the following:

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